**TAN AH TECK**

**v.**

**COFFRAL (M) SDN. BHD.**

HIGH COURT MALAYA, SHAH ALAM
WAN YAHYA J
[COMPANIES WINDING-UP NO. 28-27 OF 1990]
11 JULY 1991

***COMPANY LAW:*** *Whether agents of mortgagor or mortgagee - Terms of debenture under which receiver is appointed - Companies Act 1965, s. 218*

The petitioner applied for the winding-up of the respondent company under s. 218 of the Companies Act 1965 (the Act). The respondent company contended that the petition should be dismissed or stayed. At the hearing, two issues were raised, firstly, whether the receiver and manager of C is entitled to appear in Court to resist the petition and secondly, the application of s. 218 of the Act. It was argued that the petitioner could rest its application on both the presumptive limb of s. 218(2)(a) as well as the positive proof under s. 218(2)(c) of the Act.

**Held:**

**[1]** The receiver's power ends after a winding-up order has been made by the Court. The phrase "on the commencement of the liquidation" means when actual liquidation begins after an order from the Court has been obtained and not at the time when the petition is being heard.

**[2]** The right of the receiver to appear in Court and to oppose the petitioner's winding-up application rests on his authority as a debenture holder receiver and his legal relationship with the respondent. The powers of a debenture holder receiver are usually defined in the debenture deed. The deed was not mentioned or displayed in the affidavit of the receiver while para. 2 of his letter of appointment merely mentioned "subject to the powers and in the conditions indorsed on the said debenture contained". Paragraph 3 of the letter restricts the power of the receiver manager only to the normal day to day operation and expressly requires the receiver to obtain further consent in case of doubt. Nowhere in the letter of appointment or in the receiver's affidavit was there any mention made regarding the receiver being an agent of the respondent company.

**[3]** A debenture holder receiver is only empowered to act and do all those things which he is so authorised according to the debenture and the covering trust deed which provide for his appointment. In the absence of any express or implied terms to the contrary in the debenture and trust deeds, receivers appointed out of Court are not agents of the company. The receiver did not produce any documents to support any contention that they were acting as agents on behalf of the respondent company.

**[4]** Therefore, the receiver is not competent to object to the winding-up application by the petitioner. The directors could have brought such an objection as the mere appointment of receivers does not necessarily bring about the termination of a company's activities or its liquidation. If the receivers are able to realise sufficient assets to satisfy the debenture holder's claim, the company may yet continue to function as a going concern. A debenture holder receiver's primary duty is to realise the company's assets, to distribute the proceeds to the debenture holders in satisfaction of their claims and to return any surplus assets to the company.

**[5]** In the event that the Court's finding on the competency of the receiver is wrong, then on the merits of the application under s. 218 of the Act:

(a) the appointment of a debenture holder receiver is not conclusive of insolvency; the petitioner must go further to show that the receiver had taken possession of the complete or entire assets of the company. The receiver's appointment does not necessarily imply that the liabilities of the company has exceeded its assets. On the facts of this case, the petitioner has not made out positively that the respondent company is insolvent;

(b) once a notice under s. 218(2)(a) has been served on a company, it has to meet the presumptive challenge by disputing the existence of the debt. It can do so by either showing that the debt is non-existent or that the petitioner is not its creditor. In the instant case, except for the statutory notice which demanded a fixed sum, nowhere was there any statement or any form of document in support of the petitioner's claim - on the other hand, the respondent company's allegations were supported by documentary evidence;

(c) the respondent company had successfully established a *bona fide* dispute of the debt as claimed by the petitioner. However, since the receiver in the instant case is not a competent party to rebut the presumption under s. 218(2) of the Companies Act, his application is dismissed.

*[Order in terms of the petition; respondent company ordered to be wound up.]*

**Cases referred to:**
*Gosling v. Gaskell [1897] AC 575* ***(cit)***
*Re Vimbos, Ltd. [1900] 1 Ch 470* ***(cons)***
*Deyes v. Wood & Ors. [1911] 1 KB 806* ***(cons)***
*Griffiths v. Secretary of State for Social Services [1973] 3 All ER 1184* ***(cit)***
*Newhart Dvpts. Ltd. v. Co-operative Commercial Bank Ltd. [1978] 2 All ER 896* ***(cons)***
*Re Chic Ltd. [1905] 2 Ch 345* ***(not foll)***
*Re Union Accident Insurance Co. Ltd. [1972] Ch D 1 All ER 1105* ***(not foll)***

**Legislation referred to:**
Companies Act 1965, ss. 167-172, 188(1)(c), (4), 218(2)(a), (c)

*For the petitioner - Ong Ban Chai (Francis Cheong with him); M/s. Ong Ban Chai & Co.*
*For the respondent - Jasmin Mohd. Zain (K.M. Tang & T.K. Gan with him); M/s. Chung & Chan*

**JUDGMENT**

**Wan Yahya J:**

By a petition dated 29 April 1989, Tan Ah Teck, the petitioner, trading as Plumcon Plumbing and Construction Co. (Plumcon) petitioned for the winding up of Coffral (Malaysia) Sdn. Bhd., the respondent (Coffral) under s. 218 of the Companies Act 1965.

Coffral immediately made an application for the dismissal of or stay of that petition, which is the subject matter of the present hearing.

At the hearing, two issues were raised. The first issue was that Coffral having been placed under receivership by the debenture holder, the receiver manager is not competent to make this application to oppose the winding-up petition. The second issue is over the application of s. 218 of the Companies Act 1965.

***First Issue***

Coffral was placed under receivership by the Hong Kong and Shanghai Banking Corporation, a debenture holder, and the appointment of Michael Yee Kim Shing was made in a letter dated 20 March 1989. The application to set aside the winding up petition was made by Michael as one of the receivers and managers of Coffral. The question that has been raised is whether Michael as such is entitled to appear in this Court to dispute the petitioner's claim and to rebut the presumption under s. 218 of the Companies Act 1965.

Counsel for the petitioner reading the following passage from Kerr argues that the receiver's power had ended on the commencement of the liquidation:

> On the commencement of the liquidation, the agency of the receiver for the company determines. If he continues to carry on business after such determination, he does not in a normal case become an agent for the debenture holders; he becomes a principal. Thus he will become personally liable on all contracts into which he enters, to the exclusion of the company. He will of course be entitled to a right of indemnity out of the assets in his hands. After the commencement of a winding-up he should if possible obtain authority from the debenture holders to continue to carry on business as their agent.

I am unable to accept the view. What the author meant by the phrase 'On commencement of the liquidation' is that stage when actual liquidation begins after an order from the Court has been obtained and not at the time when the petition is being heard. *Gosling v. Gaskell* [1897] AC 575 was cited as an authority by Counsel for the petitioner. However a passage beginning at the bottom of p. 576 and continued at p. 577 as reproduced below appears to have supported my view that commencement of liquidation here refers to the stage after a winding up order has been made by the Court:

> On 1 September 1892, a petition was presented to the High Court of Justice for the winding-up of Poole & White, Limited; and, on the 14th of that month, **the Court ordered that the company should be wound up by the Court** under the provisions of the Companies Acts. The official receiver became liquidator of the company, and subsequently Mr. Wilding was appointed liquidator in his place. (Emphasis is mine)

However there are some pertinent citations in this case as regards the contractual relationship of the parties on which I shall be reverting to later.

I think the right of the receiver to appear in Court and to oppose the petitioner's winding-up application would rest on his authority as a debenture holder receiver and his legal relationship with Coffral. The powers of a debenture holder receiver are usually defined in the debenture deed. The deed was not mentioned or displayed in the affidavit of the receiver whilst para. 2 of his letter of appointment merely mentioned "subject to the powers and in the conditions indorsed on the said debenture contained."

Paragraph 3 of the letter restricts the power of the receiver manager only to the normal day to day operation and expressly requires the receiver to obtain further consent in case of doubt.

Nowhere in the letter of appointment or in the receiver's affidavit, was there any mention made regarding the receiver being an agent of the company, that is, Coffral. The legal relationship between the receiver and the company and its creditors are discussed in the House of Lords's case of *Gosling v. Gaskell* (*supra*) per Lord Halsbury LC at p. 581 when His Lordship commented:

> The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of debts. The trade is not carried on by or on account of the creditors, though their consent is necessary in such case, for without it all the property might be seized by them in execution; but the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on.

The proposition that a receiver is not an agent of the company was discussed a year later in *Re Vimbos, Ltd.* [1900] 1 Ch 470 in particular at p. 472 in the submission of Stewart-Smith for the respondent when he said:

> There is no general rule that a receiver appointed by a mortgagees is the agent of the mortgagor. No doubt he is in that position when appointed under the Conveyancing Act 1881, and formerly was so under Lord Cranworth's Act; or the same result may be produced by a special contract, as in *Jeffreys v. Dickson*, which was referred to by Rigby LJ. But, apart from statutory provisions or the terms of the agreement between the parties, he is the agent of the mortgagee. Even if the receiver is the agent of the company, the liquidator cannot make him account by a summons in the winding-up of the company, but must bring an action against him in the ordinary way. The receiver is not a servant or officer of the company; he is altogether outside the liquidation.

This view is apparently accepted by Cozens-Hardy J in part of his judgment at p. 473 wherein he stated:

> There is nothing to say that the receiver is to be the agent of the mortgagor, who is solely to be responsible for his acts and defaults, as in the Conveyancing Act. There is nothing whatever to say what he is to do with moneys which he receives. There is no direction to him to keep down the interest on the mortgage, or pay any arrears or surplus over to the mortgagor. There are none of those provisions one finds in an ordinary receivership deed, and it does seem to me that the receiver in these circumstances was the agent of the persons who appointed him, not the agent of the mortgagor.

Ten years later in *Deyes & Ors. v. Wood* [1911] 1 KB 806 the legal relationship between the receiver and the mortgagor (company) as discussed in *Re Vimbos, Ltd.* (*supra*) was applied at pp. 823 and 824 in the Court of Appeal, Kennedy LJ expressed it in the following terms:

> ...where there is the appointment of a receiver one comes to look at the provisions of condition 18, one finds a great deal which goes to show that it was intended here that the receiver should be a receiver on behalf of the mortgagees, and not on behalf of the company, the mortgagors ... I will not say that its provisions constitute an entirely clear case of such an expression as to the inclusion of certain portions of the Conveyancing Act as must necessarily exclude any other portion of that Act; but it does appear to me that they do go a long way towards showing that the receiver to be appointed was not intended to be in the position of a receiver appointed under the machinery provided by the Conveyancing Act in lieu of entry into possession by mortgagees, but was intended to be the agent of the mortgagees to take such possession as was necessary for the purpose of realizing the security, and distributing the proceeds amongst them.

Further at p. 821 of the same case, Farewell LJ observed:

> I need not refer to all the provisions of the debenture in *Rre Vimbos, Ltd.*, but Warrington J said that they were similar to those of the debenture in the case before him, and, upon the true construction of those debentures, both of the learned Judges came to the conclusion that the receiver could not be considered as entirely the agent of the mortgagors. Cozens-Hardy J

appears to have been of the opinion in the one case that the receiver was not the agent of the mortgagors for any purpose, while Arrington J thought in the other case that the receiver was partly agent for the mortgagees, and partly agent for the mortgagors, for he went on 'to say, 'I think he' (the receiver) 'is also for some purposes the agent of the company, and certainly to such an extent as may be necessary to enable him to exercise the powers conferred upon him by the debenture.' The reasons given by Warrington J in the passage which I have cited from his judgment for the conclusion that the receiver was agent for the mortgagees seem to me very forcible and worthy of consideration.

On the foregoing authorities I am prepared to hold that a debenture holder receiver is only empowered to act and do all those things which he is so authorised according to the debenture and the covering trust deed which provide for his appointment. In the absence of any express or implied terms to the contrary in the debenture and trust deeds, receivers appointed out of Court are not agents of the company. A debenture holder receiver's primary duty is to realise the company's assets, to distribute the proceeds to the debenture holders in satisfaction of their claims and to return any surplus assets to the company.

In the hearing before the Court, Counsel for the receiver neither canvassed nor produced any documents to support any contention that they were acting as agents on behalf of Coffral and I have no hesitation in holding that they were not. If they were not agents of the company, can they appear as one of them did to object to the winding-up application by Plumcon. In my opinion they were not competent to do so. If the receivers were not a competent party, the next question that may arise is who should have been the proper party to make such an application. I am inclined to think that the directors could have done so. The mere appointment of receivers does not necessarily bring about the termination of a company's activities or its liquidation. If the receivers are able to realise sufficient assets to satisfy the debenture holder's claim, the company may yet continue to function as a going concern.

The appointment of a debenture holder receiver even with the authority to act as agent of the company does not operate to terminate the director's control of service with the company unless such appointment of receiver is inconsistent with the continued employment of a managing director - see *Griffiths v. Secretary of State for Social Services* [1973] 3 All ER 1184. In *Newhart Dvpt. Ltd. v. Co-operative Commercial Bank Ltd.* [1978] 2 All ER 896 it was held that a provision in a debenture empowering the receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the receiver with the capacity to bring such an action, and did not divest the company's directors of their power to institute proceedings on behalf of the company, provided that the proceedings did not interfere with the receiver's function of getting in the company's assets or prejudicially affect the debenture holder by imperilling the assets. Furthermore, the directors were under a duty to bring an action which was in the company's interest because it was for the benefit of the creditors generally, and to pursue that right of action did not amount to dealing with the company's assets so as to require the receiver's consent or concurrence.

Even if the receiver is to be regarded as having the legal authority to apply for setting aside the petition, he certainly appeared from the affidavit filed, not to be a competent person to do it. The reference to the disputed debt was superficial and speculative in nature and gave me the impression that the transaction involved matters peculiarly within the knowledge of the directors.

***Second Issue***

In the event that my finding on the competency of the receiver is wrong, I shall proceed to examine the merit of the application. It was argued that the petitioner could rest its application on both the presumptive limb of s. 218(2)(a) as well as by positive proof under s. 218(2)(c). The case of *Re Chic Ltd.* [1905] 2 Ch 345 was cited as an authority for the position that the appointment of and the taking over of the entire assets by a receiver for debenture holder, as in this case, is by itself a positive proof of insolvency. With respect, I am unable to accept that proposition. In *Re Chic Ltd.* [1905] 2 Ch. 345 the petitioner had not only obtained a judgment against the company but the special circumstances in that case show clearly that the liabilities of that company which stood at £4700 was far in excess of its entire assets estimated at £800 only. Thus, the company in that case was clearly insolvent.

Insolvency is principally a question of fact which may be established by several ways, for example, the company's failure to honour its bills of exchange, unpaid outstanding debts, unsatisfied judgment, admission of its inability to pay debt and also by showing that a receiver for debenture holders has taken possession of all assets of the company. In the last instance it is not sufficient to show merely that a receiver has been appointed but the petition must go further to show that the receiver had taken possession of the complete or entire assets belonging to the company. The appointment of a receiver by a debenture holder does not necessarily imply that the liabilities of the company has exceeded its assets or in other words it is insolvent. In my view the petitioner has not made out positively that the company is insolvent.

The next ground for which the winding-up application is made rests on the presumptive limb of s. 218(2)(a) which reads:

> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

My understanding of the above section is that once a notice as in the above section has been served, the company has to meet the presumptive challenge by disputing the existence of the debt. It can do so by either showing that the debt is non-existent or that the petitioner is not its creditor.

In our present case, para. 5 of Plumcon's affidavit in support of the winding-up petition merely stated that RM203,885.74 together with appropriate interest being the rental charges and the balance purchase price of galvanised scaffolding and accessories sold and delivered was due; full particulars whereof were rendered to Coffral from time to time. Except for the statutory notice which made a demand for a fixed sum nowhere was there any statement or any form of document in support of the alleged claim displayed in the affidavit. On the other hand, in Coffral's affidavit in encl. No. 18 and in para. 18 thereof the company claimed that Plumcon owed them RM654,657.48. The allegation was supported by another affidavit (28) by one Yong Voon Kar alleging that the amount is in respect of the same type of equipments rented out by Coffral to Plumcon. In support of this, Coffral filed several documents. Similarly in para. 17 of that affidavit, they displayed a letter from one Mr. Lars Linden, the last manager of their company alleging that Plumcon's claim was fabricated and totally fictitious.

Plumcon elected not to answer these serious allegations but instead raised further points of law under ss. 167 - 172 and s. 188(1)(c) and (4) of the Companies Act as well as the question of the receiver's *locus* to rebut the presumption. In my opinion Coffral's failure to comply with the directives under these two sections will not result in their being presumed insolvent. I do not think the decision in *Re Union Accident Insurance Co. Ltd.* [1972] 1 All ER 1105 as cited by petitioner's Counsel will apply to the above proposition.

In conclusion I would hold that on the facts disclosed in its affidavit, I am satisfied that Coffral had successfully established a *bona fide* dispute of the debt as claimed by the petitioner. However, as I have ruled earlier that the receiver in this particular instant is not a competent party to rebut the presumption under s. 218(2) of the Companies Act, I have to dismiss his application.

There shall accordingly be an order made in terms of para. 8 of the petition as follows:

(a) that Coffral (Malaysia) Sdn. Bhd. may be wound up by the Court under the provisions of the Companies Act 1965;

(b) that Ng Pyak Yeow to be appointed as liquidator;

(c) that the petitioner and all supporting creditors be allowed the costs of and incidental to the winding-up which is to be taxed by the proper officer of the Court and paid by the liquidator out of the assets of the company.

Also found at [1991] 3 CLJ 2227